IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.99 OF 2004

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Siemens Limited ...Petitioner

v/s.

Captech Online Pvt.Ltd.
and ors. ...Respondents

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Mr.Rahul Chitnis i/b V.Deshpande & Co. for the Petitioner.

Mr.M.M.Vashi for the Respondents.

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CORAM: D.K.DESHMUKH, J.

DATED: 22ND AUGUST,2005

P.C.:

1. By this petition the Petitioner challenges the award made by the sole arbitrator dated 10th December, 2003 holding that the issue referred to arbitrator is not arbitrable.

2. The facts that are material and relevant for deciding this petition are that the Petitioner filed a civil suit in this court being Civil Suit No.2208 of 2003. In that suit by an order dated 22nd July, 2003 the court appointed a sole arbitrator to decide the dispute between the parties as to the quantification of the liability and as to the date on which the Respondents handed over possession. The parties were also granted liberty to raise any other issue not specifically referred to in the order. Before the arbitrator, preliminary objection to the jurisdiction of the arbitrator was raised. It was contended by the Respondents that in effect the Petitioner was seeking an award from the arbitrator to recover from the Respondents licence fee of the

premises as the dispute about the recovery of licence fee between the licensee and licensor is within the exclusive jurisdiction of the Small Causes Court the issue was not arbitrable.

3. The learned arbitrator after hearing both sides relying on the judgment of the Supreme Court in the case of Mansukhlal Dhanraj Jain v/s. Eknath Vithal Ogale, AIR 1995 S.C. 1102 and the judgment of the Supreme Court in the case of Natraj Studio (P) Ltd. v/s. Navrang Studio, AIR 1981 SC 537 held that the issue is not arbitrable.

4. Following can be taken as an admitted position:

(i) that the dispute between the parties relates to commercial premises;

(ii) admittedly there was a leave and licence agreement in writing dated 21st April, 1998;

(iii) Under that agreement an amount of Rs.94 lakh was given as security deposit;

(iv) So far as aspect of possession is concerned, it

is an admitted position that when the proceedings were pending before the learned arbitrator, there was no dispute between the parties that the Petitioner is in possession of the premises. Therefore, the dispute between the parties on which the arbitrator had to rule was as to how much amount as licence fee or compensation the Respondents are liable to pay to the Petitioner and as to what is the exact date on which the Petitioner received the possession of the premises from the Respondents.

5. The learned Counsel appearing for the Petitioner mainly relies on the judgment of the Division Bench of this Court in the case of Vijaya Bank v/s. Maker Development Services Pvt.Ltd., 2001 (3) Bom.C.R. 652 to claim that though a suit under Section 41 of the Small Causes Court by the Petitioner for recovery of licence fee against the Respondent was maintainable, a reference to arbitration on that issue is not barred. The learned Counsel submits that the Supreme Court had taken a view in its judgment in the case of Mansukhlal Dhanraj Jain, referred to above, that a suit between the licensee and the licensor in relation to recovery of possession is maintainable only before the Small Causes Court under Section 41

of the Presidency Small Cause Courts Act, because there was a non obstante clause contained in Section 41 and after the non obstante clause was removed by Maharashtra amendment with effect from 24th August, 1984, the Small Causes Court does not have the exclusive jurisdiction to try the suit. According to the learned Counsel, the law laid down by the Supreme Court in the Mansukhlal case is based on non obstante clause in Section 41 and therefore it is no longer good law in view of the amendment. According to the learned Counsel the same position goes in so far as the judgment of the Division Bench in the case of Nagin Mansukhlal Dagli v/s. Haribhai Manibhai Patel, 1979 Bom.C.R. 348 is concerned. According to the learned Counsel, so far as the judgment of the Supreme Court in the case of Natraj Studios, referred to above, is concerned, that judgment is not on the provisions of Section 41 of the Presidency Small Cause Courts Act, but it considers the provisions of Section 28 of the Bombay Rent Act and as the provisions of Section 28 has a non obstante clause, that judgment is also not relevant for deciding the question which arises in this petition. According to the learned Counsel, therefore, the reliance placed by the learned arbitrator on the judgment of the

Supreme Court in the case of Natraj Studios as also the judgment of the Supreme Court in Mansukhlal case for holding that the issue is not arbitrable is not right. According to the learned Counsel this position has been considered by the Division Bench in its judgment in the case of Vijaya Bank and the Division Bench has held that in view of the amendment in the provisions of Section 41, the Small Causes Court ceases to have exclusive jurisdiction to try the dispute in relation to licensee and licensor, and therefore, the dispute between the licensee and the licensor about delivery of possession and also for recovery of licence fee can be entertained by the arbitrator.

6. On the other hand, on bahalf of the Respondents it is submitted that though by amendment in the year 1984 the non obstante clause was removed from Section 41, the jurisdiction of the civil court to entertain the suit between the licensor and licensee for recovery of possession and for recovery of licence fee is excluded by necessary implication. The legislature has created a special forum, namely the Small Cause Court for resolution of dispute between the licensee and licensor in relation to recovery of

licence fee and therefore by necessary implication the jurisdiction of the court of original civil jurisdiction to try this suit is ousted. The learned Counsel further submits that the Supreme Court in its judgment in Natraj Studios (supra) has observed that special provision has been enacted in the Presidency Small Cause Courts Act for trial of suits between the licensee and the licensor for recovery of possession and for recovery of licence fee. There is also provision made by Section 42 for appeal against the order passed under Section 41. In view of the public policy that underlines the provisions of Section 41 and Section 42, the disputes between the licensee and licensor have to be tried before the special forum created by the legislature and not by arbitration. The learned counsel appearing for the Petitioner further submits that the observations that have been made by the Division Bench in its judgment in the case of Vijaya Bank are to be read in the light of the observations made by the Division Bench in paragraph 37 that the suit with which the Division Bench was dealing was not a suit falling within the provisions of Section 41 of the Presidency Small Cause Courts Act.

7. Now, if in the light of these rival submissions and the admitted position the record of the case is perused, it becomes clear that the dispute between the parties was in their capacity as licensor and licensee and the dispute related to the recovery of licence fee and therefore the suit falls squarely within the four corners of provisions of Section 41 of the Presidency Small Cause Courts Act. Perusal of the judgment of the Supreme Court in the case of Natraj Studios shows that the Supreme Court has held that the arbitration proceedings between the parties whose rights are regulated by the special statute and where that statute creates special forum, the arbitrator will not get jurisdiction to arbitrate that issue. The observations are to be found in paragraph 17 of the judgment of the Supreme Court in the case of Natraj Studios. Para 17 reads as under:-

> 17. The Bombay Rent Act is a welfare legislation aimed at the definite social objective of protection of tenants against harassment by landlords in various ways. It is a matter of public policy. The scheme of the Act shows that the conferment of exclusive jurisdiction on certain Courts

> is pursuant to the social objective at which the legislation aims. Public policy requires that contracts to the contrary which nullify the rights conferred on tenants by the Act cannot be permitted. Therefore, public policy requires that parties cannot also be permitted to contract out of the legislative mandate which requires certain kind of disputes to be settled by special Courts constituted by the Act. It follows that arbitration agreements between parties whose rights are regulated by the Bombay Rent Act cannot be recognised by a Court of law.

8. Therefore, to find out whether the issue referred to arbitration was arbitrable or not, an inquiry has to be made to find out whether Section 41 confers exclusive jurisdiction on the court of Small Causes to entertain the suit between the licensor and licensee relating to recovery of possession and for recovery of licence fee. It is true that the judgment of the Supreme Court in the case of Mansukhlal Jain and the judgment of the

Division Bench of this court in the case of Nagin Mansukhlal Dagli holding that the Small Causes Court under Section 41 has exclusive jurisdiction to try the suit between the licensor and licensee relating to recovery of possession and recovery of licence fee relies mainly on non obstante clause that was contained in Section 41. In my opinion, however, mere deletion of non obstante clause from Section 41 will not make much difference. Because of the non-obstante clause contained in Section 41, the jurisdiction of the civil court to entertain the suit between the licensee and licensor for recovery of possession and for recovery of licence fee was expressly barred. But perusal of the provisions of Section 9 of the Civil Procedure Code shows that the jurisdiction of the civil court to entertain the suit can be expressly barred and it also can be barred by necessary implication. It can now be taken as a settled law that when the legislature creates special forum for adjudication of disputes of a particular nature then by necessary implication, jurisdiction of the court of original civil jurisdiction to entertain those disputes is barred by necessary implication. The legislature by enacting section 41 created a special forum for

adjudication of dispute between the licensor and licensee in relation to recovery of licence fee and recovery of possession. Section 42 also created forum for filing an appeal against the decision of Small Causes Court. Thus, as the legislature has created a special forum for adjudication of dispute between the licensee and licensor in relation to recovery of possession and licence fee, the jurisdiction of the court of original civil jurisdiction will be ousted by necessary implication and therefore applying the law laid down by the Supreme Court in Natraj Studios, the reference to arbitration of the question which falls for decision before the Small Causes Court suit under Section 41, cannot be possible. The Division Bench of this court in its judgment in the case of Ramesh Dwarkadas Mehra & ors. v/s. Indravati Dwarkadas Mehra & ors, 2001(4) Bom.C.R. 417 was considering the question whether a suit by or against the gratuitous licensee is maintainable before the civil court. The court held that a gratuitous licensee is not a licensee within the meaning of the Bombay Rent Act and therefore, a suit by a gratuitous licensee is maintainable before the civil court of original jurisdiction. While considering that question, the

Division Bench has also considered the jurisdiction of the Small Causes Court under section 41 of the Presidency Small Cause Courts Act. The observations of the Division Bench in its judgment in paragraph 47, 48 and 49 are relevant. They read as under:-

> 47. With these principles in mind, let us now scan the provisions of section 41 and see the extent to which the jurisdiction of Civil Court is intended to be excluded thereunder.
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> 48. Ex facie reading of section 41 of the Presidency Small Cause Courts Act, 1882 does not indicate that the jurisdiction of Civil Court is excluded thereunder. In fact, the wording of section 41 would suggest that the jurisdiction of the Small Causes Court is in addition to and not to the exclusion of the competent Civil Court. In Nagin (supra) this issue was considered by the Division Bench of our High Court. A contention was specifically raised that section 41 gave concurrent jurisdiction of the Small Causes Court without taking away

the jurisdiction the High Court on its Original Side or the Bombay City Civil Court possessed prior to the coming into force of the 1976 Amending Act. This Court rejected the contention by placing reliance on the amendment carried out to Clause 12 of the Letters Patent of this Court and section 3 of the Bombay City Civil Court Act, 1948. The Bombay City Civil Court Act, 1948 and the Bombay High Court Letters Patent Act, 1948 were both brought into force simultaneously on 16th August, 1948 by notification dated 14th August, 1948. The cumulative effect of these two amendments was that the High Court had no jurisdiction to receive, try and determine any suit cognizable either by the Presidency Small Causes Court at Bombay or the Bombay City Civil Court. It was for this reason that the Division bench overruled the contention and held that where a suit is cognizable either by the Bombay City Civil Court or the Bombay Presidency Small Causes Court, the High Court would not have concurrent

jurisdiction to try such a suit. Thus a suit which falls within section 41 of the Presidency Small Causes Courts Act, 1882 and is cognizable by the small Causes Court, would not be cognizable by the City Civil Court by reason of section 3 of the Bombay City Civil Court Act, 1948 and would not be cognizable by the High Court on the Original Side by reason of the amendment to Clause 12 of the Letters Patent. Thus, the result is that section 41 of the Presidency Small Causes Courts Act, 1882 excludes the jurisdiction of Civil Court i.e. the Bombay City Civil Court upto its pecuniary jurisdiction, and thereafter the Original Side of the High Court.

49. Having reach the conclusion that section 41 of the Presidency Small Cause Court Act, 1882 excludes the jurisdiction of the Civil Court in respect of matters made cognizable by the Small Causes Court, the principle of stricto construction must, therefore, apply. The jurisdiction of the Civil Court cannot be said to have been

taken away beyond what was intended.

Thus, perusal of the above quoted observations of the Division Bench shows that a claim which can be entertained by Small Causes Court under Section 41 of the Presidency Small Cause Courts Act cannot be entertained by the Civil Court. In other words, according to the Division Bench the jurisdiction of the Small Causes Court under Section 41 to entertain the suits which are within the competence of the Small Causes Court is exclusive.

8A. Perusal of the judgment of the Division Bench in Vijaya Bank's case shows that there is a clear finding recorded by the Division Bench that the suit that was concerned, could not have been filed under Section 41 of the Presidency Small Cause Court Act. Paragraph 37 of the judgment reads as under:-

> 37. In any event, the real dispute between the parties, which the arbitrator had to arbitrate upon, was not whether the respondent was entitled to licence compensation. This is obvious from the

> fact that the stand of both the parties before the arbitrator was that the licence had come to an end on 31-3-1998. Both the parties, however, differed on the consequence of what should transpire after 31-3-1998 on account of the conduct of the parties. In our judgment, therefore, this was not a dispute which would fall within the province of section 41 of the Presidency Small Causes Act, 1882. This was very much a dispute within the province of the Civil Court which the parties were entitled to submit to Arbitration, which they did.

The Division Bench in paragraph 38 referred to amendment in Section 41 in the year 1984. But it further observes that the judgment of the Division Bench in Dagli's case does not help the Appellant in that case because the suit was for specific performance of the agreement of the parties and there was an arbitration clause. In my opinion, the Division Bench's judgment in the case of Vijaya Bank cannot be read to take a view that because of the

amendment in 1984, the Small Causes Court does not have exclusive jurisdiction to try the suit between the licensee and licensor in relation to recovery of possession and for recovery of licence fee. In any case, I find that the view that has been taken by the learned arbitrator relying on the two judgments of the Supreme Court is a possible view to be taken in the facts and circumstances of this case and therefore considering the jurisdiction of this court to interfere with the award under Section 34, in my opinion, the award cannot be interfered with.

9. Petition, therefore, fails and is dismissed. Petitioner is directed to pay costs of this petition to the Respondents, as incurred by the Respondents.

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